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The Performance Exemption under Section 110(5): Time for a Change

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Comments

The Performance Exemption Under Section 110(5): Time for a Change

I. Introduction

In 1976, Congress enacted the new Copyright Act[1] in order to modernize the guidelines controlling a field of law which is continually subject to technological changes and advances. The protections afforded the copyright owner are vast. However, exceptions and limitations are imposed in order to satisfy the dual tension which is inherently present in copyright law: encouraging and rewarding an author's creative labor while promoting broad public availability of the composing artist's works.[2]

Under the 1976 Act, when one "performs" a copyrighted work, one may be subject to an infringement action if a license is not first obtained.[3] "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process. . . ."[4] For example, when one receives a broadcast, one is technically performing. Hence, if a person turns on a radio receiver in the home, the person is "performing" and, thus, infringing on the author's right to protection of his or her work. This person is protected, however, because he is in the privacy of his home.

When a retail store plays a radio station for the pleasure of its customers, is its broadcasting of, and, thus, performing the works broadcasted by a local station, subject to an infringement action? This question cannot be simply answered. More appropriately, the

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1. 17 U.S.C. §§ 101-810 (1976).

2. This inherent conflict was noted by the Register of Copyrights in his 1961 Report before Congress: "Although the primary purpose of the copyright law is to foster creation and dissemination of intellectual work for the public welfare, it also has an important secondary purpose: To give authors the reward due them for their contribution to society." Register of Copyrights, 87th Cong., 1st Sess., Copyright Law Revision, Report on the General Revision of the U.S. Copyright Law 5 (House Judiciary Comm. Print 1961).

3. *See infra* note 62.

4. 17 U.S.C. § 101 (1976).

answer is: it depends. This comment will examine section 110(5) of the 1976 Act which addresses this issue and the legislation and case law which preceded it.

The statutory exemption to performance provides that the following does not constitute an infringement:

> communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless -
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> (A) a direct charge is made to see or hear the transmission; or
> (B) the transmission thus received is further transmitted to the public.[5]

This section appears to be straightforward. Upon closer examination, it becomes apparent that the section may be troublesome in today's age of technological advancement. What constitutes a receiver normally found "in private homes?" Did Congress intend that technological advances be considered? Like most people who consider listening to the radio to be a public right, storeowners may not be aware that the difference between protection and liability may be a radio receiver with four speakers as opposed to one with six. Thus, how viable is this section? Is the concept, to receive a broadcast is to perform, a proper one? If it is accepted that the airwaves can be subject to private ownership and control at every level, that every time a radio is tuned in, one may be subject to infringement, there will be a lack of practical guidelines and the composing artist's interest will be unduly advanced at the expense of the public interest.

II. Pre-1909 and the 1909 Act

In order to properly understand the precedent upon which section 110(5) evolved, an historical overview of copyright law and specifically the development of radio performance under it is necessary.[6] The concern for protecting and promoting artistic endeavors was early evidenced by legislation in both England[7] and the Colonies, and, in 1789, the founding fathers empowered Congress "[t]o promote the progress of science and useful Arts, by securing

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5. 17 U.S.C. § 110(5) (1976).

6. *See generally* A. Latman, The Copyright Law—Howell's Copyright Law Revised and the 1976 Act, 2-14 (5th ed. 1979) (providing an historical review of the development of copyright law) [hereinafter cited as Latman].

7. *Id.* at 3. In England, the Statute of Anne, 8 Anne c. 19, 1710, was the first statute to acknowledge the rights of artists. *Id.*

for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[8] The copyright acts of this country have been guided by this constitutional mandate.

Although there existed four general copyright acts prior to 1909,[9] the Copyright Act of 1909[10] was the guiding legislation until the 1978 enactment of the present Copyright Act of 1976.[11] Because the radio was not yet in existence in 1909, there was no section analogous to today's section 110(5).[12] Nevertheless, with the advent of radio, issues concerning performance with respect to radio broadcasting arose. Thus, in 1925, the Sixth Circuit, in *Jerome H. Remick & Co. v. American Automobile Accessories Co.*,[13] affirma-

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8. U.S. CONST. art. I, §8, cl. 8. *See* Goldstein v. California, 412 U.S. 546, 561 (1973) (the terms of clause eight are not to be narrowly construed, but are to be interpreted "with the reach necessary to reflect the broad scope of constitutional principles"); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("[t]he economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors").

9. These Acts of 1790, 1831, 1870, and the Revised Statutes afforded protection to the artist for a specific number of years. Although the first Act only protected an author's map, chart, or book, the later legislation enlarged the property subject to protection, including such other artistic endeavors as painting and dramatic and musical compositions. *See generally* Goldstein v. California, 412 U.S. 546, 562 n.17 (1973); LATMAN, *supra* note 6, at 7; Solberg, *Copyright Reform*, 35 YALE L.J. 48 (1925).

10. 17 U.S.C. §§ 1-216 (repealed 1978). Legislative history reveals the purpose of the 1909 Act:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based on any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted. . . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.
>
> In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.

H.R. REP. No. 2222, 60th Cong., 2d Sess. (1909).

11. 17 U.S.C. §§ 101-810 (1976).

12. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 395 (1968) (addressing the issue of statutory interpretation of the 1909 Act, the Court acknowledged that "this is a statute that was drafted long before the development of the electronic phenomena with which we deal here").

13. 5 F.2d 411 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925). In *Remick*, defendant manufacturing corporation operated a radio station for advertising purposes and had tuned in plaintiff's copyrighted composition. Bringing a bill in equity, plaintiff averred that defendant's actions constituted a public performance for profit.

tively decided the issue of whether the broadcasting of a copyrighted musical work over the radio constituted infringement.[14] Finding the plaintiff protected under section 1(e) which afforded the performer with "the exclusive right . . . [t]o perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit,"[15] the court determined that the broadcasts were intended to[16] stimulate defendant's radio products sales and, hence, constituted a public performance for profit.

In the following year, the Southern District of New York in *Jerome H. Remick & Co. v. General Electric Co.*,[17] found liability on the part of the broadcaster for having transmitted copyrighted works to the public. In its discussion, the court asked, "[c]ertainly those who listen do not perform, and therefore do not infringe. Can it be said with any greater reason that one who enables others to hear participates in the unauthorized performance, so to be a contributory infringer?"[18] Responding to its own question, the court set forth two hypothetical situations: in the first, a person inside a building tuned in a radio and left a window open, thus enabling individuals outside of the building to hear the music. This person was not considered an infringer. In the second situation, a person who was "equipped with instruments animated by electricity constantly furnished" and who tuned in the instrument was an active participant in transmitting the protected works and was, thus, a performer-infringer under the court's interpretation of the Act.[19]

Borrowing the two scenarios posed by the New York court, the court in *Buck v. Debaum*[20] arrived at a different conclusion.

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14. *Id.* The court acknowledged that although there was no specific section addressing the issue, "the statute may be applied to new situations not anticipated by Congress, if . . . such situations come within its intent and meaning." *Id.* at 411.

15. 17 U.S.C. § 1(e) (repealed 1978).

16. Later cases made it clear that one need not intend to infringe in order to be liable for infringement. *See* Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 198 (1931); Pye v. Mitchell, 574 F.2d 476, 481 (9th Cir. 1978); County of Ventura v. Blackburn, 362 F.2d 515, 518 (9th Cir. 1966).

17. 16 F.2d 829 (S.D.N.Y. 1926). The issue before the court was whether "one who by means of the microphone 'picks up' another's unauthorized performance of a copyrighted musical composition and transmits it by radio from a broadcasting station maintained and operated to stimulate the sale of radio products is liable for infringement of copyright." *Id.* at 829.

18. *Id.*

19. *Id.*

20. 40 F.2d 734 (S.D. Cal. 1929). In *Debaum*, the plaintiff, president of the American Society of Composers, Authors, and Publishers (ASCAP), *see infra* note 23, asserted that defendant's broadcasting of a radio station in defendant's cafe for the pleasure of its patrons

Resolving that the act of tuning in a radio was, in fact, analogous to opening a window in the sense that neither constituted performance, the *Debaum* court reasoned that a radio station's transmission of copyrighted works to the public is a performance, while the simultaneous receipt of compositions which "are omnipresent in the air" is not a performance.[21] Indeed, the court stated that when a copyright owner licenses a station to play its works, it impliedly consents to the free transmission of the compositions from the licensed station to whomever intercepts the airwaves.

The precedential value of the *Debaum* decision was undermined when the case upon which the *Debaum* court had based its decision was reversed on appeal by the United States Supreme Court in 1931. In *Buck v. Jewell-LaSalle Realty Co.*,[22] the American Society of Composers, Authors, and Publishers[23] alleged that a hotel's use of a radio receiving set to transmit broadcasts to its guests via speakers which had been placed in public and private rooms constituted a public performance for profit.[24] Writing for the majority, Justice Brandeis reasoned that when one tunes in a radio station, inaudible sound waves are converted into audible frequencies, causing a reproduction and, hence, a performance to occur.[25] Concluding that performance was present, the Court stated that the existence of a for profit motive did not have to be determined.[26]

Noteworthy is that the Court's seemingly clear decision was weakened by its dicta. In a footnote, the Court commented that had the broadcasted radio station been licensed to transmit the artist's work,[27] "a license for its commercial reception and distribu-

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constituted public performance for profit under section 1(e).

21. 40 F.2d at 735. Specifically, the court reasoned that "[o]ne who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law." *Id.*

22. 283 U.S. 191 (1931).

23. The American Society of Composers, Authors and Publishers (ASCAP), a performance rights society, was founded in 1914 and is comprised of lyricists, composers and music publishers. ASCAP sublicenses to those wishing to publicly perform for profit copyrighted works of ASCAP members. When unlicensed performances are discovered, ASCAP often institutes actions to enforce its members' rights. Another major performance rights society is Broadcast Music, Inc. (BMI). E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 410-12 (2d ed. 1982).

24. Suit was also brought against the radio station for its broadcasting of a copyrighted song for which it had not paid licensing fees. 283 U.S. at 195 n.1.

25. *Id.* at 200.

26. *Id.* at 202. Justice Brandeis wrote, "[b]ut whether there was a performance does not depend upon the existence of the profit motive." *Id.*

27. *See supra* note 24.

tion by the hotel company might possibly have been implied."[28] This statement seemed to imply that if a later court was presented with a *Jewell-LaSalle* issue, it might inquire whether the broadcasted station was or was not licensed; if the station tuned in was a licensed one, liability would be avoided, while if an unlicensed station was tuned in, liability would result. The Supreme Court distinction was clearly questioned[29] and later cases seemed to ignore the suggested distinction between licensed and unlicensed broadcasting stations.[30]

The *Jewell-LaSalle* decision remained the controlling precedent for greater than thirty-five years, during which time "it was assumed that all business establishments required a license from the copyright owner before they could legally pick up broadcasts off the air and retransmit them to their customers and guests."[31] This rigid policy was disturbed in 1968 when the Supreme Court, in *Fortnightly Corp. v. United Artists Television, Inc.*,[32] again addressed the issue of performance and found that performance was absent. Referring to its decision in *Jewell-LaSalle,* the Supreme Court stated that the Court's prior holding was "a questionable 35-year old decision that in actual practice has not been applied outside its own factual context."[33]

In *Fortnightly,* the petitioner operated a cable television system

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28. 283 U.S. at 199 n.5.

29. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) (Fortas, J., dissenting). Therein, Justice Fortas stated that "the interpretation of the term 'perform' cannot logically turn on the question whether the material that is used is licensed or not licensed." *Id.* at 406 n.5. *See also* 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.18[A], at 8-186 n.10 (1983), wherein the author wrote:

> [T]he two major performing right societies, ASCAP and BMI, do not choose to enforce the Jewell-LaSalle doctrine to its logical extreme in that they do not demand performing licenses from commercial establishments such as bars and restaurants which operate radio or television sets for the amusement of their customers. . . . [although] such demands are made of hotels which operate in the manner of the LaSalle Hotel.

Id.

30. *See* Society of European State Authors and Composers v. New York Hotel Statler Co., 19 F. Supp. 1 (S.D.N.Y. 1937) (hotel's transmitting of copyrighted works from a *licensed* radio station via a master receiving set to guests' rooms constituted infringement). *See also* Note, *The Meaning of "Performance" Under the Copyright Act,* 7 U. TOL. L. REV. 705, 713 (1976) ("[i]t is apparent, [despite the *Jewell-LaSalle* footnote] that the rule established in *Jewell-LaSalle* was interpreted by the courts to embrace both licensed and unlicensed broadcasts").

31. N. BOORSTYN, COPYRIGHT LAW § 5.25, at 168 (1981).

32. 392 U.S. 390 (1968), *reh'g denied,* 393 U.S. 902 (1967).

33. *Id.* at 401 n.30. As noted above, *Jewell-LaSalle* was applied outside its factual situation, *see supra* note 30.

(CATV),[34] whereby it received, by way of antennae, television programs from five television stations. The programs were converted and transmitted to subscribers via cables.[35] The respondent,[36] in instituting its copyright infringement action against the petitioner, alleged that petitioner's transmission of the television programs constituted unauthorized performance for profit under the 1909 Act.[37]

Although the case concerned the medium of television and not radio, the issue of performance was the central issue addressed by the Court. Discussing the interplay between those who broadcast a television program and those who view it, Justice Stewart found that "[b]roadcasters perform. Viewers do not perform."[38] He reasoned that while a television viewer furnished the means by which electronic signals were converted into visible images and audible sounds, the viewer was merely a "passive beneficiary" of the signals that abounded.[39] Essentially, the Court placed the CATV system "on the viewer's side of the line,"[40] finding that the CATV equipment was similar to that provided by the viewer in the sense that it facilitated a viewer's ability to receive the broadcaster's signals and that the system was not a broadcaster.[41] Thus, the impact of the *Fortnightly* decision was that while the television station was a performer under the Act, one who enhanced receipt of the

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34. For a discussion of the CATV systems, *see* United States v. Southwestern Cable Co., 392 U.S. 157, 161 (1967) ("CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers").

35. 392 U.S. 390 at 392. The subscribers paid a flat monthly rate and were able to choose among five stations by turning the knobs on their television sets. *Id.* at 392-93.

36. The respondent, United Artists Television, Inc., held copyrights to several motion pictures. *Id.* at 393.

37. *Id.* Respondent asserted protection under sections 1(c) and (d) which provided in pertinent part:

> Sec. 1 Exclusive Rights as to Copyrighted Works
>
> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right . . .
>
> (c) To deliver . . . nondramatic literary work; . . . and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. . . .
>
> (d) To perform or represent the copyrighted work publicly if it be a drama . . .

17 U.S.C. § 1(c)-(d) (repealed 1978).

38. 392 U.S. at 398 (footnote omitted).

39. *Id.* at 399.

40. *Id.* (footnote omitted).

41. *Id.* at 400. The Court concluded "[w]ith due regard to changing technology, we hold that the petitioner did not under [the] law 'perform' the respondent's copyrighted works." *Id.* at 402.

airwaves by use of a receiving set, whether the individual was the ultimate viewer or one who enhanced the transmission of airwaves to the ultimate viewer, was merely a recipient and not subject to copyright liability.

Six years later, the Supreme Court granted certiorari in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*[42] in order to resolve a similar allegation of copyright infringement against the CATV system.[43] The petitioners in *Teleprompter* argued that developments in the CATV system since the *Fortnightly* decision necessitated a finding of performance for profit.[44] Disagreeing with this stance, the majority applied a functionality approach used in *Fortnightly*,[45] stating that the advancements made in the system, such as its ability to transmit to more distant locations,[46] did not transform the CATV system into the status of broadcaster-performer.[47]

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42. 415 U.S. 394 (1974).

43. *See supra* note 34.

44. 415 U.S. at 403-04. The three developments were: program origination on the part of the system; commercials being sold by CATV operators; and interconnection between different CATV systems. *Id.*

45. The *Fortnightly* Court evaluated that the issue of CATV liability was to be determined by the "function that CATV play[ed] in the total process of television broadcasting and reception." 392 U.S. at 397. Noteworthy is that the application of this "function" test to the facts in *Teleprompter* has been criticized. *See* NIMMER, *supra* note 29, § 8.18[A], at 8-191 (1983) ("[g]iven this distinction [between the broadcaster and viewer functions], the *Teleprompter* Court's conclusion that the complex and costly technology involved in importing signals still falls on the viewer side of the line seems to this writer unrealistic and overly restrictive"). *See also* Oannay, *An Overview of Teleprompter v. CBS and Other Recent Developments—Ominous Signals for Copyright Law*, 22 COPYRIGHT SOC'Y OF THE USA 10 (1974-1975), where the author wrote:[The Teleprompter] court was concerned only with the vague "functional" test of the meaning of the term "perform"—not with the economic impact of distant signal importation. This judicial methodology produces a kind of tunnel vision. First, rights and liabilities arising out of the use of today's sophisticated technology (such as cable television) obviously involve immensely important, previously undecided, and complex and difficult questions of economic and public policy. Second, these questions cannot be controlled or resolved satisfactorily by judicial interpretation of vague and ambiguous words—such as "perform"—plucked from a copyright statute enacted more than half a century ago, when the particular technology in issue was not conceived or conceivable. *Id.* at 14.

46. In *Fortnightly*, the system picked up local signals only. 392 U.S. at 391-92.

47. 415 U.S. at 409-10. The court reasoned:By importing signals that could not normally be received with current technology in the community it serves, a CATV system does not, for copyright purposes, alter the function it performs for its subscribers. When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program. The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so. The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the

The issue of performance was again squarely addressed by the Supreme Court in *Twentieth Century Music Corp. v. Aiken.*[48] In *Aiken,* the respondent owner and operator of a fast food store,[49] equipped his shop with a radio which was connected to four speakers located in the ceiling. Each day Aiken tuned in a radio station and broadcastings were heard by him, his customers, and his employees. On March 11, 1972, the radio station which respondent had tuned in, broadcasted two copyrighted musical pieces owned by petitioners.[50] Although the radio station was licensed to broadcast, respondent had not obtained a license, and in petitioner's suit it averred that the radio reception constituted an infringement on petitioner's exclusive right to "perform" the protected compositions.[51] The Court acknowledged that the central issue for disposition was whether respondent's radio reception constituted a performance. Limiting *Buck v. Jewell-LaSalle Realty Co.*[52] to its factual situation,[53] the Supreme Court reaffirmed the *Fortnightly*[54] and *Teleprompter*[55] decisions and held that respondent's actions did not constitute performance.[56] To hold otherwise, the Court stated, "would result in a regime of copyright law that would be wholly unenforceable and highly inequitable."[57] It was against this background that the issue of "performance" was addressed by Congress in fashioning the present copyright legislation.

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distance between the broadcasting station and the ultimate viewer. *Id.* at 408.

48. 422 U.S. 151 (1975). *Aiken* is noted at 14 DUQ. L. REV. 739 (1976).

49. Customers were invited to either take out the food they purchased or eat it in the store. 422 U.S. at 152.

50. *Id.* at 152-53.

51. *Id.*

52. *See supra* notes 22-31 and accompanying text.

53. The Court was referring to the fact that the radio station in *Jewell-LaSalle* was not licensed to broadcast the copyrighted works. *See supra* note 24.

54. *See supra* notes 32-41 and accompanying text.

55. *See supra* notes 42-47 and accompanying text.

56. 422 U.S. at 160-61. The majority approvingly quoted the rationale of the Court of Appeals for the Third Circuit: "[I]f Fortnightly, with its elaborate CATV plant and Teleprompter with its even more sophisticated and extended technological and programming facilities were not 'performing,' then logic dictates that no 'performance' resulted when the [respondent] merely activated his restaurant radio." *Id.* at 161-62 (quoting Twentieth Century Music Corp. v. Aiken, 500 F.2d 127, 137 (3d. Cir. 1974)).

57. *Id.* at 162.

III. The 1976 Act

A. *Legislative History*

Acknowledging the need to update the statutory law, in 1976 congressional members wrote, "[s]ince [1909] significant changes in technology have affected the operation of the copyright law."[58] Specifically required was a section which would provide guidelines with respect to radio performance and which would address the dilemma presented in *Aiken*.[59] Under the format of the new Act,[60] the meaning of "perform" is set forth in the Act's definitional section[61] and exemptions to a copyright owner's exclusive rights[62] are separately indicated in section 110.[63]

Scrutiny of the legislative history behind section 110(5) indicates that the section is intended to apply to "performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use."[64] Both the Senate[65] and

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58. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 47 (1976).

59. *See infra* notes 65, 68. *See also* Latman, *supra* note 6, at 189 ("[t]he *Aiken* problem was addressed in the exemption found in § 110(5), but the result is far from clear").

60. 17 U.S.C. §§ 101-810 (1976).

61. *See supra* text accompanying note 4.

62. *See* 17 U.S.C. § 106 (1976) which enumerates the exclusive rights granted a copyright owner. Section 106 provides in pertinent part:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
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> (4) in the case of literary, musical, dramatic, and choreographic works . . ., to perform the copyrighted works publicly . . .

Id.

63. It is noteworthy that under the 1909 Act, a copyright owner's exclusive rights to public performance extended to use of the works "for profit," 17 U.S.C. § 1(e) (repealed 1978), while under the 1976 Act this "for profit" requirement was replaced by the specific exemptions found in 17 U.S.C. § 110 (1976). *See generally,* Korman, *Performance Rights In Music Under Sections 110 and 118 of the 1976 Copyright Act,* 22 N.Y.L. Sch. L. Rev. 521 (1977).

64. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 86 (1976). The House Report indicated that turning on a radio receiver in public is an act "so remote and minimal" that liability is not justified and that such an exemption "should be made explicit in the statute." *Id.*

65. *See* 122 Cong. Rec. S1564 (daily ed. Feb. 6, 1976): "[T]his exemption would not apply where broadcasts are transmitted by means of loudspeakers or similar devices in such establishments as bus terminals, supermarkets, factories, and commercial offices, department and clothing stores, hotels, restaurants and quick-service shops of the type involved in *Twentieth Century Music Corp. v. Aiken.*" *Id. See also* Brennan, *Legislative History and Chapter 1 of S.22,* 22 N.Y.L. Sch. L. Rev. 193, 202 (1976) (commenting on the above Senate statement, the author wrote, "[i]t is the specific intent of the Senate to reverse the Supreme Court holding in *Twentieth Century Music Corp. v. Aiken* . . ." (footnote omitted)).

House[66] specifically referred to the *Aiken* holding in their discussions, the House Report stating that the factual circumstances surrounding *Aiken* "represent the outer limit of the exemption and . . . that the line should be drawn at that point."[67] Although both branches of Congress generally agreed upon the content of the section, a Conference Committee, comprised of members of both branches, met to agree upon its scope[68] and the present section 110(5) resulted.[69]

B. *Case Law*

Since the Act's promulgation, few cases have arisen under section 110(5).[70] In 1981, in *Sailor Music v. Gap Stores, Inc.*,[71] mem-

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66. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 86-87 (1976).

67. *Id.* at 87. Continuing, the House Committee wrote:

> [T]he clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customer's enjoyment but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system. Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.

Id.

68. *See* CONF. REP. No. 1773, 94th Cong., 2d Sess. 75 (1976). The Conference Committee stated:

> It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt. However, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply.

Id. The background music service about which the conferees spoke, was in reference to pending litigation between ASCAP and a member of the background music industry, Muzak; the latter being concerned that potential subscribers to its service were instead opting to use radio station broadcasting. *See* Korman, *supra* note 63, at 533.

For comment on the Conference Committee's Report, *see* LATMAN, *supra* note 6, at 193 ("it remains to be seen, after this tortious history, how the conference report language will be construed"); NIMMER, *supra* note 29, § 8.18 [C], at 8-204 (the Conference Committee Report "adds an unfortunate further element of vagueness which renders application of section 110(5) quite speculative").

69. *See supra* text accompanying note 5.

70. *See* Sailor Music v. Gap Stores, Inc., 516 F. Supp. 923, 924 (S.D.N.Y.), *aff'd*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) ("[t]he reach of these provisions of section 110(5) has scarcely been tested in the courts.").

71. *Id.*

bers of ASCAP brought action against the Gap Stores, Inc., a retail clothing store establishment, alleging that the actions of two of its chain stores of transmitting radio programs to its customers by way of a radio receiver connected to recessed loudspeakers[72] constituted infringement. Presented with the issue of whether the defendant was exempt from liability under section 110(5), the court applied the pertinent legislative history to the facts and determined that the exemption was not applicable. Specifically, the court reasoned that the physical size of the Gap Stores was large enough to warrant subscription to a commercial background music service.[73] In addition, the type of receivers used by the establishments[74] necessitated a finding of copyright infringement. In affirming the district court, the Second Circuit[75] also found the physical size of the stores to be a compelling factor[76] in its decision that the establishments exceeded the "outer limit" of protection afforded in section 110(5).[77]

The only other case to date addressing whether a section 110(5) exemption was operable is *Broadcast Music, Inc. v. United States Shoe Corp.*[78] Therein, Broadcast Music, Inc. [BMI][79] alleged that the women's retail apparel store, Casual Corner, infringed under the Copyright Act by broadcasting radio stations over its four or

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72. One of the stores was equipped with four speakers, while the other store had seven speakers. *Id.* at 924.

73. *Id.* at 925. The court noted that one store was 2769 square feet and the other was 6770 square feet, of which 4690 square feet was selling space open to the public. *Id.* at 924. The court compared this to the restaurant in *Aiken* which was 1055 square feet with a 620 square foot commercial area available to the public. *Id.*

74. Both parties presented experts to testify whether the components were those "commonly used in private homes," as required under section 110(5). *Id.* at 925. The court resolved that "the stereo apparatus used by the specified Gap Stores, including built-in wiring and four or seven loudspeakers recessed in ceiling cavities, may be considered to be 'standard home receiving apparatus [converted] (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system.' " *Id.* at 925 (citing H.R. REP. No. 1476, 94th Cong., 2d Sess. 87 (1976)).

75. 668 F.2d 84 (2d Cir. 1981).

76. *Id.* at 86. Finding that the size of the store justified a subscription to a commercial background service as outlined in the Conference Report, *see supra* note 68, the Second Circuit also wrote that the Gap Store "is much larger than the shop in *Aiken* which, as Judge Gagliardi concluded, indicates that Congress did not intend it to be exempted from the mandates of the copyright laws pursuant to § 110(5)." 668 F.2d at 86.

77. *See supra* text accompanying note 67.

78. 678 F.2d 816 (9th Cir. 1982).

79. BMI, like ASCAP, is a performance rights society which was a licensor of numerous songs which had been broadcast at Casual Corner. *See supra* note 23 for a brief description of performance rights societies.

more speakers which were connected to a single radio receiver.[80] In a brief opinion affirming the lower court's grant of summary judgment, the Ninth Circuit found that Casual Corner was not within the contemplation of the narrow infringement exemption.[81] Furthermore, the court disagreed with appellant's contention that the section's wording, "commonly used in private homes,"[82] was void for vagueness, stating "[w]e believe that a person of ordinary intelligence can understand and apply the requirements of the Act."[83]

IV. Conclusion

It is important to note that merely because few cases exist interpreting section 110(5), this lack of litigation does not necessarily indicate that the section is a viable one. Indeed, when faced with the choice of the high cost of litigation as opposed to paying licensing fees[84] to tune in a radio station, a commercial establishment may understandably find it economically feasible to pay the fee.

This, however, does not resolve the suggested premise that section 110(5) is not a viable part of the copyright legislation. Bearing in mind the inherent tension created in a field of law in which two opposite interests are sought to be protected — that is the freedom of public access to artistic endeavors and the reward afforded to the author, composer, or publisher — section 110(5) promotes the latter at the expense of the former.

The initial premise that the airwaves are the property of private individuals[85] as opposed to the public permits disparate treatment among recipients of radio broadcasts and, thus, the public in general is injured. Is it logical to permit a small commercial establishment which uses a home receiver "with four ordinary loudspeakers

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80. 678 F.2d at 817.

81. The court held, "Casual Corner exceeds this limit because each store has a commercial monaural system, with widely separated speakers of a type not commonly used in private homes, and the size and nature of the operation justifies the use of a commercial background music system." *Id.*

82. 17 U.S.C. § 110(5) (1976).

83. 678 F.2d at 817.

84. The current annual licensing fees charged by ASCAP with respect to a radio broadcast in any type of commercial establishment which does not serve food or drink are: one hundred dollars for the first one, two or three speakers and twenty dollars per additional speaker after three. (Figures collected from a current rate schedule issued by ASCAP.) It may be noted that these fees are likely to be tax deductible as ordinary and necessary business expenses under 26 U.S.C. § 162 (1976).

85. This is necessarily so or else fees for tuning in a radio station would not be possible.

grouped within a relatively narrow circumference from the set"[86] to be exempt from liability under section 110(5), as the House Report condoned, while a store which places six speakers not so closely to the set may be subject to liability? Such confusing distinctions would not be necessary if it were accepted that the airwaves are in the public domain and once a radio station has paid its licensing fees to broadcast the protected works and the works are transmitted over the airwaves, any member of the public may freely tune in the broadcasted works. This suggestion merely redraws the line as to how far the copyright owner's monopoly may reach, and increases the public interest in benefitting from the artistic works.[87]

Application of the section is rendered more questionable when it is viewed in light of our current technological age. It is clear that technological advancements are continually occurring and, as Congress acknowledged, "technology promises even greater changes in the near future."[88] Is it, therefore, practical to set forth legislation which requires — or should require — that its guidelines be continually subject to change given rapidly advancing technology? Furthermore, is it logical to continually apply the factual circumstances found in *Aiken*[89] — a 1975 case — as being the outermost limitation to section 110(5) application, as the legislative history so provides?[90] Certainly what is determined to be beyond the scope of a receiver commonly found in a home today may clearly be found in a home tomorrow, if not considered obsolete in a homeowner's eyes a year from now. It is, therefore, clear that section 110(5) promotes confusing distinctions to the shopkeeper who must decide whether or not he or she is within the parameters of the exemption.

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86. H.R. REP. No. 1476, 94th Cong., 2d Sess. 87 (1976).

87. It has been noted that radio broadcasts of copyrighted works afford the artist with a free form of advertising and, thus, rewards to the author for his or her efforts are increased in terms of potential record sales. (This is in addition to amounts received in the form of licensing fees from the commercial establishment.) *See*, Comment, *Music and the Courts: Copyrights*, 27 BAYLOR L. REV. 331 (1975):

> The extended audience actually has an added benefit for the copyright holder whose compositions are played on the radio. While providing a common source of entertainment, the radio additionally acts as a free advertisement for a more lucrative form of royalties and copyright benefits—record sales. Out of five hundred people surveyed, only two could recall recordings they had purchased which they had not first heard on the radio.

Id. at 338 (footnote omitted).

88. H.R. REP. No. 1476, 94th Cong., 2d Sess. 47 (1976).

89. *See supra* notes 48-57 and accompanying text.

90. *See supra* text accompanying note 67.

An equitable balance with respect to the above-mentioned interests sought to be protected in copyright law is also absent. The logical alternative is to shift the emphasis away from who *receives* the broadcast and the type of set by which the transmission is received and to focus attention upon the sender. The parties from whom royalties are received should stop with the radio station and should not extend to the recipient who merely tunes in a desired station. In this way, the law will be clear. The public interest will be promoted, and the copyright holder will still be protected.

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